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No. 73-870

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

STANLEY MARKS AND RICHARD MATTRELLA,
Petitioners,

vs.

THE CITY OF NEWPORT, KENTUCKY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF KENTUCKY

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In the

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No. ———

STANLEY MARKS AND RICHARD MATTRELLA,
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vs.

THE CITY OF NEWPORT, KENTUCKY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF KENTUCKY

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the State of Kentucky entered in the above entitled case on September 5, 1973, which, upon remand from this Court for reconsideration of its judgment of October 1, 1971, the Court of Appeals for Kentucky, after reconsideration, was of the opinion that there was no valid reason why it should modify or dissolve the judgment of the Circuit Court for Campbell County, Kentucky, entered August 20, 1971, and thereby reaffirmed and reinstated the order restraining Petitioners from in any manner distributing five publications protected by First Amendment privilege and further restraining Petitioners from in any manner distributing any publication which may fall within the

statutory definition of obscenity set forth in Section 436.101 of the Revised Statutes of Kentucky.

OPINION BELOW

The opinion of the Circuit Court for Campbell County, Kentucky, Division One, is unreported and printed herein as Appendix A. The Order of the Circuit Court for Campbell County striking and expunging from the record two paragraphs of its opinion is unreported and printed herein as Appendix B. The opinion of the Court of Appeals for Kentucky affirming the Circuit Court is unreported and printed herein as Appendix C. The opinion of the Court of Appeals for Kentucky finding no valid reason to modify or dissolve the judgment of the Circuit Court and reaffirming and reinstating the Circuit Court Order, after remand for reconsideration by this Court is unreported and printed herein as Appendix D. The Complaint, Second Amended Complaint and Answer are printed herein, respectively, as Appendix E, F and G.

JURISDICTION

The judgment of the Circuit Court for Campbell County, Kentucky, entered against Petitioners on August 20, 1971, granting a Temporary Injunction (which is still in effect) restraining Petitioners from the distribution of five publications protected by the First Amendment, and which further restrained Petitioners from the distribution of all other publications of the kind and character which fall within the statutory definition of obscenity (§ 436.101, Kentucky Revised Statutes) for which contempt proceedings pend before the Circuit Court. The judgment of the Court of Appeals for Kentucky, overruling Petitioners' motion to dissolve or modify the Temporary Injunction

and affirming the judgment of the Circuit Court, was entered against Petitioners on October 1, 1971. On December 29, 1971 Petitioners filed their Petition for a Writ of Certiorari, Case No. 71-844, in this Court and the Petition was granted and the case vacated and remanded for further consideration in light of *Miller* v. *California*, —— U.S. ——, 93 S.Ct. 2607 (1973), and other cases on June 25, 1973 at —— U.S. ——, 93 S.Ct. 3036 (1973). The Court of Appeals, after reconsideration and finding no valid reason why it should modify or dissolve the temporary injunction, reaffirmed and reinstated its Order of October 1, 1971, by Order entered September 5, 1973. The judgment of the Court of Appeals was thus final. *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971); *Mills* v. *Alabama*, 384 U.S. 214 (1966). The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1257 and 2101, and Part V of the Rules of this Court.

QUESTIONS PRESENTED

The Constitutional questions to be presented by this Writ of Certiorari were presented to the Circuit Court, except Question One which arose as a question of constitutional magnitude by the Court of Appeals' reaffirmance and reinstatement of its Order after remand for further consideration, and Question Two which arose as a question of constitutional magnitude on appeal from the Circuit Court to the Court of Appeals, were raised at the earliest possible instance in the cause and are as follows:

(1) Whether the Court of Appeals for Kentucky, considering the injunctive restraint upon remand, may constitutionally restrain publications which were restrained following a common law action of nuisance where no statute was available to consider specific and limited regulations

for the determination of materials claimed to be obscene, and where future publications could be enjoined if of a kind and character which fall within the Kentucky obscenity statute's definition, where that statute's definition does not specifically limit consideration to defined sexual conduct which if described or depicted in a patently offensive way may be regulated, and in which the restraint imposed in the manner and under the conditions present here is repugnant to the First and Fourteenth Amendments of the Constitution of the United States.

(2) Whether the Kentucky state courts may constitutionally restrain materials presumptively protected by the Constitution through a civil action based upon the common law concept of nuisance in the absence of any statutory authority governing procedure and the standards to be employed to determine the critical issue of claimed obscenity, without, in so doing, being repugnant to the First and Fourteenth Amendments of the Constitution of the United States.

(3) Whether the Kentucky state courts may constitutionally impose future restraint upon publications not in being and which are presumptively protected by the Constitution by enjoining such publications on the basis of being of a kind and character claimed to be obscene and in which no adjudication has been had on the critical question of claimed obscenity, whereby the bookstore dealer is subjected to the pains of contempt, and a prior restraint is thereby imposed upon the distribution of future publications which is repugnant to the First and Fourteenth Amendments of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the pertinent provisions of Kentucky Revised Statute 436.-101 are set forth in Appendix H herein.

STATEMENT OF THE CASE

This common law action in nuisance was commenced by respondent by filing its Complaint on July 12, 1971. On July 22, 1971 respondent amended its pleadings by filing its Amended Complaint and Second Amended Complaint. Petitioners filed their Answer. The temporary restraint issued here was commenced by respondent filing its Motion for Temporary Injunction on July 13, 1971 and the motion came on for hearing before a judge of the Circuit Court of Campbell County, Kentucky, on July 19, 1971 and was concluded on July 30th. The trial court entered its "Findings of Fact, Conclusions of Law, Judgment" on August 20, 1971 imposing injunctive restraint.

Petitioners filed their Motion to Dissolve or Modify the Temporary Injunction and Amended Motion on August 31 and September 1, 1971, respectively, in the Court of Appeals for Kentucky. On October 1, 1971 the Court of Appeals affirmed the actions of the Circuit Court.

On December 29, 1971 petitioners filed their Petition for a Writ of Certiorari in this Court, which was granted on June 25, 1973 and the judgment of the Court of Appeals for Kentucky was vacated and the cause remanded for further consideration. [— U.S. —, 93 S.Ct. 3036 (1973)].

The instant action by the respondents is a common law action, not founded on statutory authority, seeking to have petitioner Marks' bookstore determined a public nuisance

on the theory that the publications were obscene and asserting that it, the respondent City, had no adequate remedy at law and alleging irreparable injury through the suggestion that publications could come into contact with unwilling adults and minors thereby tending to affect their morals.

The subject bookstore is located on Monmouth Street, Newport, Kentucky, near eight bars, or night clubs, featuring "strip tease" floor shows, and is situated next door to one such club. The bookstore maintains an opaque front, signs are prominantly posted advising the public general that the store deals in publications of a sexual theme and minors are excluded.

No evidence was produced establishing any involvement of minors or that any publications had "filtered" into the hands of a minor, or that any intrusion had been made against unwilling adults to assault their individual privacy. All witnesses stated that they voluntarily entered the store without suggestion or coercion, and the same applied to any purchases that were made.

Of the five books offered as evidence, only one had been read by the witness, or any other person prior to its admission, and the four remaining books had not been read by any person, by the testimony, at the time of their admission. Only one witness testified as to a community standard and the standard utilized by the witness was the standard for the City of Newport, in which he stated that one publication exceeded that standard, in his opinion.

At the close of the respondent's submission of evidence, petitioners moved to strike all publications-exhibits on the basis that they had not been read by any witness negating any reasonable ground to believe them to be obscene. (R. 337). During the course of the hearing petitioners claimed

that the publications were protected by the Constitution and objected to their admission on that basis.

At the close of the respondent's case, petitioner moved to dismiss on the basis that there was no evidence that the criminal laws of Kentucky (§ 436.101, Kentucky Revised Statutes) were inadequate or that there was no adequate remedy at law; that the court could only consider restraint as to the publications before it and that to restrain the distribution of publications not before the court would invoke prior restraint against future publications; and that there was no evidence before the court of any harm, irreparable or otherwise. (R. 357-382). The cause was tried, basically, upon an application of the *Memoirs* v. *Massachusetts* formulation. (R. 382-435).

In addition to restraining the five named publications [all of which are similar to those present in *Redrup* v. *New York*, 386 U.S. 767 (1967), and *Bloss* v. *Dykema*, 398 U.S. 278 (1970)], the court further restrained publications not before it which were of a kind and character which fell within the definition of § 436.101, the Kentucky obscenity statute. (Appendix A). All of the questions presented here have been raised before the Court of Appeals for Kentucky and resolved adversely to petitioners. The temporary restraint has continued in effect since August 20, 1971 to date and during that time petitioners have been ordered to show cause why contempt should not be had against them, but which have not been heard or determined. All questions of constitutional import were raised at the earliest opportunity in the Circuit Court, unless not present at that stage and where that has been occasioned, the questions have been timely raised on appeal.

REASONS FOR GRANTING THE WRIT

Questions involving substantial constitutional issues were presented to this Court by an earlier Petition and that Writ was granted, the judgment vacated and the case remanded for further consideration in light of the constitutional principle enunciated by this Court on June 21, 1973. On the remand the original judgment was reaffirmed and reestablished.

The case now squarely presents the State's inability to view closely and critically the difficult question of the claimed obscenity of materials presumptively protected by the Constitution but which deal with a sexual theme. The issue presented is the state's attempt, in the face of constitutional principle, to regulate sexual materials upon a claim of obscenity on a future basis, with regard to any notice of scienter requirement being present: through the use of a common law action scheme providing no standard whatever; and by threat of contempt as to future publications which may subsequently be deemed obscene.

This cause further presents the use of standards employed in 1971 which have not been thereafter and to date either judicially or legislatively altered to be restricted to a specific guidance for the book distributor, which possesses the particular distinction of being no standard at all, except that which is subjectively possessed by any person, including the trier of fact, and applied to any material at issue on the claim of being obscene, resulting in the application of subjective judgment directed at environmental taste, training and background, imposing restraint upon any publication not squaring with that "taste."

With regard to all issues raised, the ruling below is in conflict with the applicable decisions of this Court concerning each issue raised.

I

Whether the Court of Appeals for Kentucky, considering the injunctive restraint upon remand, may constitutionally restrain publications which were restrained following a common law action of nuisance where no statute was available to consider specific and limited regulations for the determination of materials claimed to be obscene, and where future publications could be enjoined if of a kind and character which fall within the Kentucky obscenity statute's definition, where that statute's definition does not specifically limit consideration to defined sexual conduct which if described or depicted in a patently offensive way may be regulated, and in which the restraint imposed in the manner and under the conditions present here is repugnant to the First and Fourteenth Amendments of the Constitution of the United States.

This Court previously granted petitioners' petition for a writ of certiorari, vacated the judgment and remanded this case to the Court of Appeals of Kentucky for further consideration in light of *Miller* v. *California*, —— U.S. ——, 93 S.Ct. 2607 (1973) and companion cases decided June 21 and 25, 1973. *Marks* v. *City of Newport*, —— U.S. ——, 93 S.Ct. 3036 (1973).

The Court of Appeals of Kentucky reconsidered the matter and was of the opinion (without stated reason) that there was no valid reason why it should modify or dissolve the temporary injunction issued by the state trial court and reaffirmed and reinstated its previous order of October 1, 1971.

The restraint upon the distribution of written materials in this case is created by a first impression common law civil action based upon a nuisance concept. No statute is

involved, no case law is involved. Here the State of Kentucky is precluded from the regulation of allegedly obscene materials distributed from petitioner's bookstore where there is no applicable Kentucky law, written or authoritatively interpreted by the Kentucky courts, which can possibly meet the First Amendment standards set forth in *Miller* v. *California, supra,* 93 S.Ct., at 2614-2616. *Paris Adult Theatre I* v. *Slaton,* — U.S. —, —, 93 S.Ct. 2628, 2642 (1973).

Here, Kentucky cannot constitutionalliy regulate the materials before it upon the basis of those materials being obscene, where it has failed to specically define that sexual conduct which if depicted or described in a pattenly offensive way may be proscribed, because Kentucky has simply failed to limit the attempted regulation within limits designed to prevent infringement of First Amendment rights. *Paris Adult Theatre I* v. *Slaton, supra,* 93 S.Ct., at 2642. Further, Kentucky has imposed restraint upon future publication which have yet to be afforded a full adversary hearing as required by the Constitution. *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957); *Paris Adult Theatre I* v. *Slaton, supra.*

This case was considered by the Kentucky courts in 1971 on a theory that the materials involved met, basically, the test of *Memoirs* v. *Massachusetts,* 383 U.S. 413 (1966), with some difficulty to arrive at the application of either a state or municipal standards applicable to the contemporary community standards. The standards of the community remains unresolved, although the Circuit Court adopted a state standard. It is understood that a national standard cannot be employed because of the inability to ascertain such standard and because of the plurality of acceptance-rejection on a national scale. *Miller* v. *California, supra,* 93 S.Ct., at 2618-2620. The standards ap-

plicable to "prurient interest" or "patent offensiveness", being essentially questions of fact to be resolved by the trier thereof, the geographical location for the application of the standards is critical. Cf. *Miller* v. *California, supra,* 93 S.Ct. at 2618. A state, a county, a city, a neighborhood, or a street standards, without definition, permits complete subjectivity on the part of all persons involved in this difficult determination. Authoritative interpretation, completely absent here, is critical to all so that the state may appropriately regulate and the distributor may have fair notice of that which may be regulated and by which he may be punished. *Miller* v. *California, supra,* 93 S.Ct. 2616-2617.

Prior to June 21, 1973, the only thing that had been categorically settled in this troublesome area of constitutional litigation was that obscene materials were not protected by the First Amendment. *Miller* v. *California, supra,* 93 S.Ct., at 2613-2614. The difficult and extremely critical question of what constituted obscenity in the constitutional sense was not clearly determined until June 21, 1973, and that determination requires concrete efforts by the state to specifically limit the class of materials which may be suppressed to those designated as "hard core". *Miller* v. *California, supra,* 93 S.Ct., at 2612-2615, 2617-2618, 2622. It is only after the state has engaged in those concrete efforts of specifically limiting the regulatory scheme to defined areas that the regulatory law, as written or construed, can be tested by constitutional standard. *United States* v. *12 200-Ft. Reels of Super 8mm Film,* — U.S. —, —, 93 S.Ct. 2665, 2670 (1973).

Section 436.101, Kentucky Revised Statutes, relied in part by the Kentucky courts for a definition of obscenity, has not been authoritatively construed or amended and provides only that a finding of obscenity can be had if "to the

average person, applying contemporary standards, the predominate appeal of the matter, taken a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." That definition does not meet the standards of *Miller* and *Paris Adult Theatre.*

The materials here have been suppressed by injunctive restraint, both past and future publications, upon concepts which all members of this Court have totally rejected for different reasons. *Miller* v. *California, supra,* 93 S.Ct., at 2614. A new standard has not been applied by Kentucky, although the opportunity has presented itself in the instant cause. (Appendix D).

It is submitted, therefore, that the imposition of restraint upon past and future publications entitled to the presumptive projection of the Constitution, and the absence of any standard for judging materials, either through distribution or adjudication, raises substantial constitutional issues, requiring this Court to reaffirm existing principles and define, if necessary, the applicable standards under given conditions.

II

Whether the Kentucky state courts may constitutionally restrain materials presumptively protected by the Constitution through a civil action based upon the common law concept of nuisance in the absence of any statutory authority governing procedure and the standards to be employed to determine the critical issue of claimed obscenity, without, in so doing, being repugnant to the First and Fourteenth Amendments of the Constitution of the United States.

The legislature of Kentucky has not seen fit to enact appropriate civil legislation to regulate the distribution of obscene materials as have other states. Cf. *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957). This cause is the first, to this writer's knowledge, which undertook the suppression of materials through the extraordinary writ of injunction based upon a common law concept of nuisance requiring clear and convincing proof or irreparable injury and inadequate remedy at law. That proof was not met, except as the trial court envisioned it [Appendix A], and the record reveals the absence of any real damage:

> THE COURT: Mr. Dennison, you have presented to the Court a very persuasive argument and I'm quite concerned about the lack of proof proffered by the plaintiff. The whole testimony and the submission of some documents wasn't showing any damage that I could see at this time. Whether it follows from the issuance or not, as Mr. Wise argued, I'll have to consider. (R. 420).

The instant action alleges damages from the standpoint that the subject materials "could find their way from the purchasers thereof into the hands of and possession of children of tender years and unwilling adults in the community

tending to the present and future perversion of their morals and plaintiff and its inhabitants." (Appendix F). The trial court specifically found that no publication had been received by a child or unwilling adult. (Appendix A).

While a state may enact legislation on the presumption that a relationship exists between obscene material and antisocial conduct and the somewhat implicitly accepted position that a legislature could enact appropriate legislation on the theory of protecting the social interest in order and morality, those concepts are applicable to legislative and not judicial functioning. *Paris Adult Theatre I* v. *Slaton*, ——U.S. ——, ——, 93 S.Ct. 2628, 2637 (1973). That function cannot be exercised by a judicial officer, otherwise it is judicial legislation. To the contrary of the *Paris Adult Theatre* position is that of *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969), denying to the State the right to regulate the moral contents of its citizen's thoughts.

The concept of ad hoc common law action, without specific legislative limiting regulation, is repugnant to the constitutional concepts of free speech and due process of law, and directly opposed to the rationale of *Miller* v. *California*, —— U.S. ——, 93 S.Ct. 2607 (1973), and *Paris Adult Theatre I* v. *Slaton, supra.*

A common law action fails to observe the precise requirements of *Kingsley Books, Inc.* v. *Brown, supra; Freedman* v. *Maryland*, 380 U.S. 51 (1965), and *Blount* v. *Rizzi*, 400 U.S. 410 (1971).

Any system of prior restraints, as here, bears a heavy presumption against its validity. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *New York Times Company* v. *United States*, 403 U.S. 713 (1971). The Kentucky system fails to advise any person of the conduct sought to be regulated, failing thereby to present fair notice [*Miller* v. *California, supra*, 93 S.Ct., at 2616-2617; *Rabe* v. *Washington*,

405 U.S. 313 (1972)], and the common law, ad hoc, nuisance scheme possesses the constitutional repugnancy of no standards of obscenity being specified and permits the sensitivity to rest upon a single trier of fact without regulation. *Coates* v. *City of Cincinnati,* 402 U.S. 611, 613-614 (1971). This common law concept, without guidance of statute, fails to possess or require the necessary narrow and limited standard for application in the sensitive area of separating protected expression from unprotected speech, thereby sweeping all speech within its suppressionable area, failing to possess an ascertainable standard in the delicate First Amendment situation. *Cf. Winters* v. *New York,* 333 U.S. 507 (1948); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495 (1952); *Interstate Circuit, Inc.* v. *City of Dallas,* 390 U.S. 676 (1968). The standard, which of necessity is present in this common law, non-statutory, circumstance, allows the trier of fact to determine the ultimate question of obscenity measured by common understanding and practice which effectively licenses that trier of fact to create his own standards in each case (notwithstanding that lip service homage is paid to a recitation of some constitutional formulation of a standard for judging) which is a concept repugnant to the First and Fourteenth Amendments. *Cf., Gooding* v. *Wilson,* 405 U.S. 518, 528 (1972); *Herdon* v. *Lowry,* 301 U.S. 242, 263 (1937).

It is submitted, therefore, that the common law nuisance concept applied here is repugnant to the First and Fourteenth Amendments of the Constitution of the United States and is a restraint upon the freedom of speech, requiring this Court to reaffirm existing principles and define, if necessary, applicable standards.

III

Whether the Kentucky state courts may constitutionally impose future restraint upon publications not in being and which are presumptively protected by the Constitution by enjoining such publications on the basis of being of a kind and character claimed to be obscene and in which no adjudication has been had on the critical question of claimed obscenity, whereby the bookstore dealer is subjected to the pains of contempt, and a prior restraint is thereby imposed upon the distribution of future publications which is repugnant to the First and Fourteenth Amendments of the Constitution of the United States.

A state may not, consistent with constitutional values, restrain materials presumptively protected by the First Amendment which are not before the court, are not in being, and have not had the opportunity for adversary adjudication. *Near* v. *Minnesota,* 283 U.S. 697, 713 (1931). A state court may, in a proper case, rule materials which are in evidence and before it to be obscene and issue restraint against the distribution of those materials. *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 438 (1957). A limited injunctive remedy under closely defined procedural safeguards is one thing, but a state court must studiously withhold restraint upon materials not yet found to be offensive. *Kingsley Books, Inc.* v. *Brown, supra,* 445.

In the instant circumstance the trial court restrained any publication that may be of a kind and character defined as obscene by § 436.101, Kentucky Revised Statutes. That future imposed restraint negates any opportunity for adversary hearing and determination, and the procedural safeguards attended. *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961); *A Quantity of Copies of Books* v. *Kansas,* 378

U.S. 205 (1964); *Freedman* v. *Maryland,* 380 U.S. 51 (1965); *Blount* v. *Rizzi,* 400 U.S. 410 (1971). The bookseller is placed in that perilous position of fear of distribution because of potential pains of contempt should he misjudge his publication or be unable to inspect his inventory completely, with the resulting denial of free circulation of books to which the public is entitled under the First Amendment. *Cf. Smith* v. *California,* 361 U.S. 147 (1959).

The only guide as to future conduct offered the bookseller is that provided by the Kentucky obscenity statute's definition of obscenity [§ 436.101, Kentucky Revised Statutes]. That statutory definition does not square with the limitations and specificity required by *Miller* v. *California,* — U.S. —, 93 S.Ct. 2607 (1973), and which must be adhered to before any publication can be suppressed in order to protect the constitutional principles present. The Kentucky obscenity statute's definition is an unconstitutional exercise, which remains so until judicially or legislatively altered.

It is submitted, therefore, that the injunctive relief granted to suppress future publications is an impermissible prior restraint upon constitutionally protected materials and repugnant to First and Fourteenth Amendments, requiring this Court to reaffirm existing principles.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

CAMPBELL COUNTY CIRCUIT COURT
Division No. One

CITY OF NEWPORT, KENTUCKY
Plaintiff

vs.

STANLEY MARKS, ET AL
Defendants.

FINDINGS OF FACT CONCLUSIONS OF LAW JUDGMENT

This action was instituted by the plaintiff City of Newport alleging that "the processes of the criminal sanctions — have proven inadequate to prevent his (defendant Marks') further and continued maintenance of said nuisance", and seeks injunctive relief.

This cause then came on to be heard before the Court, without the intervention of a jury, upon the motion of said plaintiff for a temporary injunction. The defendant Marks was in Court, in proper person, the first day of the hearing only, although the plaintiff City and defendant Marks were in Court by counsel throughout such hearing. The defendant Mattrella appeared and testified as a witness herein, but was not represented by counsel at any time during said hearing. Plaintiff offered proof, the defendants offered none, and thereupon this matter was submitted to the Court upon the pleadings, testimony adduced, and oral arguments of counsel.

And the Court, being sufficiently informed and advised, now FINDS that

(1) the defendant Mattrella is the equitable owner and lessor of the real estate located at and known as 609 Monmouth Street, in the City of Newport, in Campbell County, Kentucky;

(2) the defendant Marks is the lessee of said premises, and conducts a book store there where various publications are offered for sale;

(3) said defendant Marks has erected and prominently displayed on said premises, signs which notify the public generally that his wares are for adults only, and all minors are excluded;

(4) said defendant Marks has also caused to be posted conspicuously, certain signs the purpose of which is to inform the public generally that books concerning sex are for sale in such store, and if such subject is offensive to an individual he should not enter;

(5) there was no evidence adduced showing any sales to minors, or of any publication from such store filtering into the hands of minors;

(6) the plaintiff City has made repeated and continued effort to halt the sale of the "literature" offered for sale by defendant Marks at the store aforesaid;

(7) the defendant Marks has totally ignored, and still ignores, the activities of said City, and has almost uninterruptedly offered said books for sale from the premises aforesaid, since the institution of this action; and

(8) all exhibits accepted by the Court and ordered entered herein, and hereinafter referred to, were obtained through bona fide purchases made at such store during normal operational hours thereof.

Several interesting questions were posed to the Court during the presentation of this case, the first of which goes to the nature of this action, and the relief sought. Is injunctive relief available here? The relief sought here is primarily in rem, seeking to prohibit the continued use of real estate in the operation of an alleged public nuisance.

Injunction is a transcendent or extraordinary remedy — not lightly indulged in. It is an equitable proceeding designed to protect from irreparable injury, property, or other rights of which a court of equity may take notice and cognizance, by prohibiting or commanding the doing of certain act or acts. Originally it was exercised in personam, and not in rem. However, during its normal growth and expansion, and primarily through statutory authorization and provision, many states now grant injunctive relief by a decree which operates in rem as well as personam. It is ordinarily preventive or protective in character, operating upon unperformed and unexecuted acts, rather than those already executed, and may issue to prevent future wrong.

What is the irreparable injury here, and the future wrong to be prevented?

Plaintiff alleges the injury flows from the sale of allegedly obscene books, which are detrimental to and tend to impair the moral fiber of the community, that the continued sale of such books is injurious to the community as a whole, and that the actions of the defendant Marks subject said plaintiff City to ridicule. If this is so, certainly injunction will lie — for what more irreparable injury than the impairment of the morals of a community?

That a court can enjoin an operator of a business that is injurious to the health and *morals* of a community was long ago upheld in the case of Repass et al. v. Common-

wealth etc et al, Ky., 115SW1131 in which our Court of Appeals said

> ". . . . . The court of chancery has from its beginning had jurisdiction to regulate the use of property. The law requires each man to so use his property as not to injure the lawful rights of others, and when the owner of property unlawfully infringes upon the rights of others the court of chancery, to prevent irreparable injury, may grant relief by way of injunction. . . . . The chancellor will not enjoin the mere commission of a crime; but, when property is used in such a way as to become a nuisance, the continuance of this nuisance may be enjoined. There is a manifest distinction between enjoining an individual from committing a crime and enjoining the owner of property or its possessor from allowing his property to injure others. In the latter case the chancellor only regulates the use which may be made of the property, restraining the defendants from so using their property as to make it a nuisance to others. If the use of the property is such as to require that it should be restrained by injunction, the chancellor's jurisdiction is not affected by the fact that this use may be also a criminal offense. The remedy in equity is purely preventive. The chancellor does not punish the defendant for what he has done. This is left to the criminal courts. The only thing that he determines is that the defendants must not in future so use their property as to be a nuisance. The judgment does not convict them of any offense. It merely restrains them in future from so using their property as to make it a nuisance. The judgment deals merely with the use of the property in question.
>
> "The chancellor may not enjoin the defendants from operating a poolroom anywhere; but he may enjoin them from so using the property referred to in the judgment as to make that property a public nuisance. The court of chancery will not restain personal conduct, but it will restain the unlawful use of property. In Commonwealth v. McGovern, 116 Ky. 212, 75 S.W.

261, 66 L.R.A. 280, we showed that the jurisdiction of the courts of equity in regard to public nuisance may be traced back to the reign of Queen Elizabeth, and may be exercised where the nuisance affects the health, morality, or safety of the community; the ground of jurisdiction being the ability of the chancellor to give a more complete and perfect remedy than is attainable at law by arresting the nuisance that is in progress and protecting the public against it by perpetual injunction. If the defendants were sending into the air from their property poisonous vapors that destroyed the health of the community, for the protection of life the chancellor might enjoin them from so using their property; or if they had upon their premises in the city of Covington a manufactory of some deadly explosive, which constantly endangered the safety of the city, the chancellor might enjoin this use of their property for the protection of the public, without waiting for the tardier processes of law, which might not be effective until great loss of life had ensued. It was in effect conceded in the argument that in such cases as these, for the protection of health or personal safety, the chancellor might intervene by injunction.

"But it was earnestly insisted that the rule should not be applied to nuisances which affect only the morals of the community. *We cannot see the force of the distinction. The state is interested in the character of its people, no less than in their health or personal safety.* The character of the state depends upon the character of the individuals constituting it. If the people become depraved, the state cannot long exist. It may have wealth, it may have all that goes to make a great state, and yet, if its men are without character, it is a crumbling ruin. *The state is as much interested in restraining those things which destroy the character of its people as in those things which destroy their health or personal security.* ..... To say that a court of equity may not enjoin a nuisance of this sort, when the criminal laws have proven inadequate, is to say

> that the commonwealth is unable to protect its citizens. If it may protect its citizens by injunction from such a use of property as would breed a pestilence among the people, upon what principle can it be maintained that it may not by injunction prevent that use of property which, while it does not destroy the body, destroys the character, and leaves only the image of a man, unfitting him for the duties of citizenship. . . . ."

Kentucky has always had a genuine interest in and a concern for the morals of its citizens and its communities. May she always have!

The Court then is of the opinion and concludes that injunctive relief will lie herein, the case cited, supra, being excellent authority therefor.

The next question confronting the Court concerns the obscenity or non-obscenity of the books purchased and offered herein as evidence.

Courts have long held that words should be considered in their usual and customary usage and acceptance; or as defined by the Legislature in a particular statute. Courts are not lexicographers. Tracent fabrilia fabri.

The word "obscene" is a simple word, adequately defined by Webster who is generally accepted as an authority on words, a lexicographer of some renown and repute. He defines "obscene" as

> "offensive to modesty or decency; indecent; lewd and in an archiac sense — disgusting, repulsive."

However, our Legislature has defined this word in its enactment of Section 461.101 (c) as follows:

> " 'Obscene' means that to the average person applying contemparary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits

of candor in description or representation of such matters."

And the Supreme Court of the United States has given "obscenity" two others definitions, ie, one, hard core pornography, and two, that the matter must appeal to pruient interest, be patently offensive, and without redeeming social value.

Exhibit No. 1 is narrative or fictional in nature — that is, a full length paper back novel, with attendant photographs. Other exhibits are books primarily photographic in nature, with some attendant writing.

How do the publications, all purchased at Marks' Emporium aforesaid, meet these definitions?

As to Webster's definition: It appears to the Court that after a very cursory perusal, one of average intelligence would immediately conclude that here is something offensive to modesty and/or decency; and that after careful and full examination one would conclude these books to be disgusting and repulsive (and this not meant to be inconsistent with later comments).

As to the State statute: It appears to the Court, the Court considering itself to be an average person, that the predominant appeal of these publications, each taken as a whole, is to prurient interest, each displays a shameful interest in nudity, sex, which goes far beyond the customary limits of candor in description of such matters.

In applying contemporary standards as required by statute, this court rejects the argument advanced by counsel for defendant that "contemporary community standards" is a natural community standard — and has applied what it believes to be a state standard (although the Court is of the opinion that a metropolitan area might just as well be the acceptable standard.)

As to the Supreme Court test: It appears to the Court that the publications under consideration appeal strongly to prurient interests, are definitely and patently offensive, and certainly without redeeming social value.

Thus, the Court is of the opinion that such publications, under any one, or all, of the definitions, are and each is obscene, now so finds and concludes.

It[1] is almost beyond comprehension that a human mind could conjure up, generate, and belch forth such depravity; that human beings would lend their bodies to such shameful exhibits in nudity; that anyone with any degree of modesty would publish or distribute such filth. The authors are depraved, the exhibitors of their bodies shameless and debased, the purveyors enemies of our moral society. Those who would produce, publish, perpetuate, protect, and prolong this type of publication should live long enough to see their children grow up and graduate from Obscene U. with a Doctorate in Pornography, magna cum laude. The Court wonders what their attitude then would be concerning their "constitutional rights".

The Court is constrained to make one extracurricular comment about the "girls". At first glance the Court had great sympathy for what appeared to be women chopped open with a meat cleaver in preparation for a caesarian operation. But on more detailed scrutinity we observed this was merely their normal abnormalities. Me-thinks they should make an appointment with a seamstress who has a heavy duty button hole sewing machine.

Recently, in a television interview, when asked if he had read the exhibits offered in an obscenity case, one learned Supreme Court Justice responded that he had not, that it was unnecessary to do so, stating in effect that "anything goes under the First Amendment".

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[1] From this point to footnote 2 stricken by order, see App. B.

This sounds like the High Priest of Gormorrah – where anything went too. But ultimately Gomorrah was destroyed just because it permitted "anything to go". Would the good Justice want to see our country go the way of Gomarrah? The Court, and most Kentuckians, we are sure, would not.[2]

The final question confronting the Court concerns scienter. Counsel for defendant Marks cited Section 436.101 (2) KRS which says (in part):

"Any person who, having *knowledge* of the obscenity .... "and argued that his client could not have known the books are obscene, that they were never before so adjudged, that they were packaged in sealed celophane containers, etc.

The words with "knowledge" or "knowingly" when used in a statute have been construed to mean with knowledge, either actual or constructive – and synonomous with intentionally. Generally speaking these words mean the person knew what he was about, and, possessing such knowledge, he proceeded to act. They impart a knowledge of the essential facts from which the law presumes a knowledge of the legal consequences arising therefrom. There must be some grounds or reason to know.

Here we have a man who rents a store to sell books. What type of books? Not the general run of books – but a special kind for "adults". He publicizes this fact, and further admonishes minors and those who find sex offensive not to patronize his place of business. All the cover pages on the books entered as exhibits would put the ordinary prudent business man (or anyone for that matter) on alert – some kind of notice. The defendant Marks knew what he was doing – and he had knowledge or certainly should have

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[2] End of stricken portion, see App. B.

had especially after the aggressive activities of the City against his place of business.

The Court finding and holding that injunction will lie, that the publications purchased as aforesaid and entered herein as exhibits are obscene, that the defendant Marks had (or reasonably should have had) knowledge thereof, and that said defendant disseminated such publications from his place of business at 609 Monmouth Street, in the City of Newport aforesaid, the Court now concludes as a matter of law that the operation of said business, in so far as it relates to books of the type herein referred to is a public nuisance.

Accordingly, it is now Ordered that the defendant Marks be and he now is restrained, and his agents, servants, employees, and all others associated with him in the conduct of the business herein referred to are also restrained, from sending or causing to be sent, or bringing or causing to be brought into this State for sale or distribution, or in this State preparing, publishing, printing, exhibiting, distributing, offering to distribute, or having in his (or their) possession with intent to distribute or exhibit or offer to distribute from or at his place of business at 609 Monmouth Street aforesaid, any obscene matter of the kind or character within said statutory definition of obscenity, including, but not limited to the following:

The Hollywood Sex Machine	by Andrew Baxter
Informal	by Tudor House Inc.
Lovelock	by Rob San Publication
Both Ways	by A Star Publication
Cuddle Up	by E L Publishing Co.

and it is further Ordered that the defendant Mattrella be and he now is also restrained from maintaining on said premises, any obscenity statutorily condemned or herein

prohibited as to his co-defendant Marks, or suffering any other person so to do.

.....

Frederick M. Warren, Judge
Campbell County Circuit Court
Division No. 1

STATE OF KENTUCKY
CAMPBELL COUNTY

This is to certify that copies of the within Findings of Fact, Conclusions of Law and Judgment were this day mailed to Mr. Lawrence Riedinger, Mr. William J. Wise, Mr. Andrew Dennison, and Mr. Richard R. Slukich, at their respective addresses.

GERTRUDE E. VENARD, CLERK
By /s/ LINDA LOHR, D.C.

DATED: August 19, 1971.

APPENDIX B

CAMPBELL COUNTY CIRCUIT COURT
Division No. One

CITY OF NEWPORT, KENTUCKY
Plaintiff

vs.

STANLEY MARKS, ET AL
Defendants.

ORDER

(Filed August 23, 1971.)

On the Court's own motion, the second and third grammatical paragraphs of the 7th page of the Judgment entered herein on 20 August 1971 are now stricken and expunged from the record.[3]

There is no place in a judicial decree for such inappropriate, caustic, personal comments, and the Court apologizes for the initial inclusion of such remarks.

/s/ FREDERICK M. WARREN
Judge

This is to certify that a copy of the within Order was mailed to Lawrence Riedinger and William J. Wise, counsel for plaintiff, and to Richard Slukich and Andrew Dennison, counsel for the defendant Marks, this 23rd day of August, 1971.

GERTRUDE E. VENARD, CLERK
BY: /s/ LINDA LOHR D.C.

[3]See footnotes 1 and 2, *supra*.

APPENDIX C

COURT OF APPEALS OF KENTUCKY

CITY OF NEWPORT, KENTUCKY
Plaintiff

vs.

STANLEY MARKS, ET AL
Defendants.

ORDER

The motion of the defendants to dissolve or modify the temporary injunction is overruled.

It is so ordered this 1st day of October, 1971.

/s/ JAMES B. MILLIKIN
Chief Justice

APPENDIX D

COURT OF APPEALS OF KENTUCKY

CITY OF NEWPORT, KENTUCKY
Plaintiff-Appellee

vs.

STANLEY MARKS and RICHARD MATTRELLA
Defendants-Appellants.

APPEAL FROM CAMPBELL CIRCUIT COURT
HON. FREDERICK WARREN, JUDGE

This cause having been remanded by the Supreme Court of the United States on June 25, 1973, for reconsideration in the light of various decisions issued by the Supreme Court during 1973, this court has accordingly reconsidered the matter and is of the opinion that there is no valid reason why it should modify or dissolve the temporary injunction issued by the Campbell Circuit Court. Therefore, the order heretofore entered by this court on October 1, 1971, denying such relief is now reaffirmed and reinstated.

Palmore, C. J., and Jones, Osborne, Reed, Steinfeld and Stephenson, JJ., sitting. All concur.

Entered September 5, 1973.

/s/ JOHN PALMORE
Chief Justice

APPENDIX E

CAMPBELL CIRCUIT COURT
Division No. One

CITY OF NEWPORT, KENTUCKY
Plaintiff

vs.

STANLEY MARKS, ET AL
Defendants.

COMPLAINT

(Filed July 12, 1971)

(1) Plaintiff, City of Newport, Kentucky, says that the defendant, Stanley Marks, together with his divers agents and employees is in possession of the real estate herein described as tenant or tenants of defendant, Richard Mattrella, to whom he attorns, and said Marks by sufferance of his co-defendant does now and has since April 1, 1971, created and maintained and he does now maintain a public nuisance thereon and therein in that he with his co-defendant's consent daily and nightly operates and conducts therein the nefarious, obnoxious and indecent business of possessing for sale and selling to the public printed obscenities of the vilest nature in flagrant and notorious violation of KRS 436.101 and of the common law, to the detriment of plaintiff and its inhabitants.

(2) The defendant, Marks, so operates and conducts said business in violation of Comissioners' Ordinance No. 1390, § 20, codified under Newport Code of Ordinances as § 110.20, a copy of which is hereto attached, and the processes of the criminal sanctions thereof have proven

inadequate to prevent his further and continued maintenance of said nuisance.

(3) The defendant, Richard Mattrella, profits by the illegal activity of Marks in that he as the landlord of said property suffers and permits the maintenance of said nuisance and receives monthly payments of money derived from the sale to the public by his tenant of pictorial biographies of sex, depicting nude adults in acts of fornication, fellatio, cunnilingus, sodomy, buggery and the fondling both manually and orally of the sex organs of the creatures there displayed.

(4) The defendant, Marks, is a non-resident of Kentucky, transacts business therein as hereinbefore alleged, supplies goods therein by and through his agent and agents at 609 Monmouth Street in Newport, Kentucky, and causes tortious injury to the morals of said inhabitants by his continual acts aforesaid.

(5) The acts of defendants as herein alleged have caused pecuniary loss to plaintiff in the expenditure of funds in its efforts to rid the community of their offensive presence in the conduct of said business and in the city's defense of its officers and agents against spurious civil actions alleged against them by said Marks and his agent, all to plaintiff's damage in the sum of $50,000.00.

(6) The remedy under criminal sanctions of said ordinance is inadequate to abate the nuisance operated, conducted and maintained by defendants, the continuance thereof is an offense to the community in its sale of said obscenities and its continued existence will not admit of the delay necessarily incident to the giving of notice of application for injunction and by reason thereof an order of restraint should and ought to issue forthwith to immediately abate said nuisance.

(7) The real estate in which said nuisance has been erected and is maintained is particularly described as follows:

PARCEL 1: Situate in the City of Newport, Campbell County, Kentucky, and being part of Lot numbered thirty-seven (37) in the Public Square Addition to said City, beginning at a point on the east side of Monmouth Street sixty-eight and one-half (68½) feet south of Sixth Street; thence south along the east line of Monmouth Street forty-five (45) feet; thence extending back eastwardly in rectangular shape one hundred (100) feet.

PARCEL 2: Lot numbered one hundred and forty-eight (148) in the Bellevue Addition to the City of Newport, Campbell County and State of Kentucky. Said lot is situated on the west side of Dayton Street between Sixth and Seventh Streets, fronting 25 feet on Dayton Street and extending back at right angles 86 feet agreeable to the recorded plan of said addition, reference being had to the same will more fully appear.

WHEREFORE plaintiff, City of Newport, Kentucky, prays judgment against defendants, Stanley Marks and Richard Mattrella, in the sum of Fifty Thousand ($50,000.00) Dollars, for orders of temporary restraint and injunction both immediate and permanent, restraining and enjoining defendants and their agents and employees from possessing for sale and selling any and all publications within the area of plaintiff which are condemned by KRS 436.101, the costs of this action and all proper relief.

LAWRENCE RIEDINGER, JR.
Attorney for Plaintiff, City of
Newport, Kentucky
8 East 5th Street
Newport, Kentucky 41071

Lawrence Riedinger, Jr., being first sworn, says that he is the duly authorized attorney for the municipal corporate plaintiff, City of Newport, Kentucky, and that the allegations contained in the foregoing Complaint are true.

LAWRENCE RIEDINGER, JR.
Attorney for Plaintiff,
City of Newport, Kentucky

Subscribed and sworn to before me by Lawrence Riedinger, Jr., this .... day of July, 1971.

.....
Notary Public, Campbell County,
Kentucky

My commission expires:
.....

APPENDIX F

CAMPBELL CIRCUIT COURT
Division No. One

CITY OF NEWPORT, KENTUCKY
Plaintiff

vs.

STANLEY MARKS, ET AL
Defendants.

SECOND AMENDMENT TO COMPLAINT

(Filed July 22, 1971)

(1) Plaintiff, City of Newport, for amendment to complaint herein, adopts herein the allegations of the original complaint herein the same as if fully written herein.

(2) For the purpose of rectifying a typographical omission plaintiff in this amendment says that the remedy under criminal sanctions of said ordinance is inadequate to abate the nuisance operated, conducted and maintained by defendants, the continuance thereof is an offense to the community in its sale of said obscenities and its continued existence will not admit of the delay necessarily incident to the giving of notice of application for injunction in that the vile opprobious pornographic periodicals and publications forming the principal wares possessed for sale and sold by defendants in said premises could find their way from the purchasers thereof into the hands of and possession of child of tender years and unwilling adults in the community tending to the present and future perversion of their morals and plaintiff and its inhabitants do now and will continue to suffer great immediate and irreparable injury, loss or damage before notice can be

served and a hearing had thereon and by reason thereof an order of restraint should and ought to issue forthwith to immediately abate said nuisance.

WHEREFORE plaintiff prays as in the original complaint herein.

LAWRENCE RIEDINGER, JR.
Attorney for Plaintiff
8 East 5th Street
Newport, Kentucky

Lawrence Riedinger, Jr., being first sworn, says that he is the duly authorized attorney for the municipal corporate plaintiff, City of Newport, Kentucky, and that the allegations contained in the foregoing Second Amendment to Complaint are true.

LAWRENCE RIEDINGER, JR.
Attorney for Plaintiff,
City of Newport, Kentucky

Subscribed and sworn to before me by Lawrence Reidinger, Jr., this 22nd day of July, 1971.

.....
Notary Public, Campbell County, Kentucky

CERTIFICATE OF SERVICE

I certify that the within Second Amendment to Complaint was served upon defendants herein by mailing exact copies of same this 22nd day of July, 1971, to their attorneys of record herein, Mr. Andrew B. Dennison, Fifth Floor Barrister House, 216 E. Ninth Street, Cincinnati, Ohio 45202, and Mr. Richard Slukich, 1 West 6th Street, Covington, Kentucky 41011.

LAWRENCE RIEDINGER, JR.
Attorney for Plaintiff

APPENDIX G

CAMPBELL CIRCUIT COURT
Division No. One

CITY OF NEWPORT, KENTUCKY
Plaintiff

vs.

STANLEY MARKS, ET AL,
Defendants.

ANSWER

Come now the defendants, STANLEY MARKS, and RICHARD MATTRELLA, and for their Answer, state as follows:

FIRST DEFENSE

That the Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

That the defendants admit that defendant, MARKS, and defendant, MATTRELLA, have on and since April 1, 1971, stood in the relationship of landlord and tenant, that defendant, MARKS pays to and the defendant, MATTRELLA, receives monthly payments as payment for the possession of the premises located at 609 Monmouth Street, Newport, Kentucky. Defendants allege that they are without knowledge or information sufficient to form a belief as the truth of the allegations contained in paragraph 7 of the Complaint as incorporated by paragraph 1 of the Amended Complaint, and defendants deny each and every

other allegation not herein admitted to be true contained in the Complaint as incorporated by paragraph 1 of the Amended Complaint and deny paragraph 2 of the Amended Complaint.

* * *

ANDREW W. DENNISON
Attorney for Defendants
216 East Ninth Street
Cincinnati, Ohio 45202

and

RICHARD R. SLUKICH
Attorney for Defendants
1 West Sixth Street
Covington, Kentucky 41011

July 23, 1971. I hereby certify that I have this date mailed or delivered a copy of this pleading to all the attorneys of record in the above styled action.

/s/ R. R. S.
Attorney for Defendants

APPENDIX H

FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

SECTION 436.101, KENTUCKY REVISED STATUTES

436.101 Obscene matter, distribution, penalities, destruction.

(1) As used in this section:

(a) "Distribute" means to transfer possession of, whether with or without consideration.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, draw-

ing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters.

(d) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(1966 c 40, § 1. Eff. 6-16-66)

(2) Any person who, having knowledge of the obscenity thereof, sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is punishable by fine of not more than $1,000 plus five dollars for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars, or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of a violation of this subsection, he is punishable by fine of not more than $2,000 plus five dollars for each additional unit of material coming within the provisions

of this chapter, which is involved in the offense, not to exceed $25,000, or by imprisonment in the county jail for not more than one year, or by both such fine and such imprisonment. If a person has been twice convicted of a violation of this section, a violation of this subsection is punishable by imprisonment in the state penitentiary not exceeding five years.

(1966 c 40, § 2. Eff. 6-16-66)

(3) Any person, who with knowledge that a person is a minor under eighteen years of age, or who, while in possession of such facts that he should reasonably know that a person is a minor under eighteen years of age, knowingly sends or causes to be sent, exhibits, distributes, or offers to distribute any obscene matter, having knowledge of the obscenity thereof, to a minor under eighteen years of age is punishable by fine of not more than $2,000 or by imprisonment in the county jail for not more than one year, or both. If a person has been previously convicted of a violation of subsections (3) or (4), he is punishable by imprisonment in the state penitentiary not exceeding five years.

(1966 c 40, § 3. Eff. 6-16-66)

* * *